Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–197 OF 2008
SURIYADI, RAMLY ALI AND AZHAR MA'AH JJCA
7 AUGUST 2009

Civil Procedure — Government proceedings — Injunction — Grant of permanent and interim injunction against government — Whether barred — Government Proceedings Act 1956 s 29 — Specific Relief Act 1950 s 54 — Whether respondent could sue government for damages instead — Federal Constitution art 13

The respondent purchased a piece of land ('the land') and obtained approval for erection of buildings on the land from Dewan Bandaraya Kuching Utara. Due to stoppages in the construction works and with the site being deeply excavated it became a danger to the adjoining land and public at large. Due to the non-compliance of the building plan and with the existence of danger to the adjoining land and the public, the appellants re-entered and forfeited the land. Being dissatisfied, the respondent filed a writ seeking a declaratory order, inter alia, that the purported re-entry was unlawful, invalid, null and void; the re-entry be set aside; and for damages. The respondent also applied for an interim injunction. The High Court granted the interim injunction against the appellants and hence this appeal. The appellants claimed, inter alia: (1) that the injunctive relief was never sought out in the writ; (2) that s 29 of the Government Proceedings Act 1956 ('GPA') and s 54 of the Specific Relief Act 1950 ('SRA') do not permit the granting of any injunction against the government and government departments respectively; (3) that the balance of convenience did not favour the granting of such an order; and (4) that damages were adequate to compensate the respondent in the event it won the main suit.

Held, allowing the appeal and ordering the interim injunction be set aside with costs here and court below:

(1) Even though the High Court has the discretion to grant the injunction, s 29 of the GPA does not permit the granting of any injunction against the government, and likewise s 54 of the SRA has the same bar for any department of any Government in Malaysia (see para 10).

(2) The injunction applied for by the respondent here did not merely revolve around an injunction per se against the government on some administrative issue, but was connected to the land that had been reacquired by the Government, and recovery of which was statutorily precluded. With the statutory prohibition in s 29(1)(b) of the GPA, there was no prospect of the respondent recovering possession of the land from the Government. Therefore there was no logical reason why an injunction was granted (see para 24).

(3) It was improbable that a permanent injunction could have been obtained by the respondent as at no time did it apply for a permanent injunction against the government servants; and even if it did, with the law as it stood the probability was slim (see para 26).

(4) There was no reasonable excuse why the government departments here should be prevented from carrying out their daily responsibilities, especially when adjoining properties were facing water seepages from the excavated area, let alone danger to the public which had become a serious issue. When assessing where the balance of convenience lies, the interest of the public may rightly be taken into consideration (see paras 27–28).

(5) Once the respondent's rights were successfully established vide the declaration action, there was no impediment for the respondent to sue for damages. Article 13 of the Federal Constitution would protect the rights of the respondent in any suit for damages against the Sarawak government (see paras 30 & 33).

[Bahasa Malaysia summary

Responden membeli sebidang tanah ('tanah') dan mendapatkan kebenaran untuk mendirikan bangunan-bangunan di atas tanah daripada Dewan Bandaraya Kuching Utara. Berikutan penghadang-penghadang dalam kerja-kerja pembinaan dan tapak yang digali dengan dalam ia menjadi berbahaya kepada tanah bersempadanan dan kepada umum. Oleh sebab pelan bangunan tidak dipatuhi dan wujudnya bahaya kepada tanah bersempadanan dan masyarakat umum, perayu telah memasuki semula dan merampas tanah tersebut. Tidak berpuas hati, responden memfailkan writ memohon satu perintah deklarasi, antara lain, bahawa kemasukan semula tersebut adalah menyalahi undang-undang, tidak sah, dan batal; dan kemasukan semula ditolak; dan untuk ganti rugi. Responden juga memohon untuk injunksi interim. Mahkamah Tinggi memberikan injunksi interim terhadap perayu-perayu dan oleh itu rayuan ini dikemukakan. Perayu menuntut, antara lain: (1) bahawa relief injunksi tidak pernah dikemukakan dalam writ; (2) bahawa s 29 Akta Prosiding Kerajaan 1956 ('APK') dan s 54 Akta Relief Spesifik 1950 ('ARS') tidak membenarkan sebarang injunksi

A terhadap kerajaan dan jabatan kerajaan; (3) bahawa imbangan kebarangkalian tidak menyebelahi pemberian perintah tersebut; dan (4) bahawa ganti rugi adalah mencukupi untuk memberi pampasan kepada responden sekiranya dia memenangi guaman utama.

B

Diputuskan, membenarkan rayuan dan mengarahkan injunksi interim ditolak dengan kos di mahkamah ini dan di Mahkamah Tinggi:

C (1) Walaupun Mahkamah Tinggi mempunyai budi bicara untuk memberikan injunksi, s 29 APK tidak membenarkan untuk memberikan sebarang injunksi terhadap kerajaan, dan begitu juga s 54 ARS yang mempunyai sekatan untuk mana-mana jabatan kerajaan di Malaysia (lihat perenggan 10).

D (2) Injunksi yang dipohon oleh responden di sini tidak hanya berkenaan injunksi terhadap kerajaan atas isu pentadbiran semata-mata, tetapi berkaitan dengan tanah yang diperoleh semula oleh kerajaan, dan pemerolehan semula yang dihalang secara statutori. Dengan larangan statutori dalam s 29(1)(b) APK, tiada kemungkinan yang responden E boleh mendapatkan semula milikan tanah daripada kerajaan. Oleh itu tiada alasan logik mengapa injunksi diberikan (lihat perenggan 24).

(3) Injunksi kekal yang diperolehi oleh responden dipersoalkan memandangkan ia merupakan satu injunksi kekal terhadap kakitangan F kerajaan; dan sekiranya dibolehkan sekalipun, kebarangkaliannya di sisi undang-undang adalah tipis (lihat perenggan 26).

(4) Tidak terdapat alasan yang munasabah mengapa jabatan kerajaan di sini perlu dihalang daripada melaksanakan kewajipan harian mereka, G terutamanya apabila harta yang bersempadan berdepan dengan air resapan daripada kawasan galian, dan bahaya kepada umum yang telah menjadi isu serius. Sewaktu menilai di mana letaknya imbangan kesenangan, kepentingan awam perlu diambil kira (lihat perenggan 27–28).

H (5) Apabila hak-hak responden dibuktikan melalui tindakan deklarasi, maka tiada halangan bagi responden untuk menyaman untuk ganti rugi. Perkara 13 Perlembagaan Persekutuan akan melindungi hak-hak responden dalam sebarang guaman untuk ganti rugi terhadap kerajaan I Sarawak (lihat perenggan 30 & 33).]

Notes

For cases on injunction, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2843–2846.

Cases referred to

Evergreen Frontier (M) Sdn Bhd v The Director of Lands and Surveys (Sabah) & Anor [2005] 2 MLJ 644; [2004] 8 CLJ 156, HC (refd)
Bato Bagi & Ors v Government of the State of Sarawak [2008] 5 MLJ 547; [2008] 6 CLJ 867, HC (refd)
Bina Satu v Tan Construction [1988] 1 MLJ 533, HC (refd)
CCA Holdings Ltd v Palm Resort Bhd [1998] 4 MLJ 143, HC (refd)
Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh [1980] 2 MLJ 148, HC (refd)
Lim Kit Siang v United Engineers (M) Bhd & Ors [1987] 2 CLJ 195, SC (refd)
Menteri Hal Ehwal Dalam Negeri, Malaysia v Karpal Singh [1992] 1 MLJ 147 (refd)
Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, FC (refd)
Pemungut Hasil Tanah Daerah Barat Daya, Penang v Kam Gin Paik & Ors [1986] 1 MLJ 362, PC (refd)
S & F International Ltd v Trans-con Engineering Sdn Bhd [1985] 1 MLJ 62, FC (refd)
Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 3 MLJ 325, CA (refd)
Saw Seng Kee v Director of Lands & Mines, Penang & Ors [1987] 1 MLJ 80, HC (refd)
Smith v Inner London Education Authority [1978] 1 All ER 411, CA (refd)
Tan Suan Choo v Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323, HC (refd)
Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd [2000] 2 MLJ 133, CA (refd)
Tengku Hj Jaafar & Anor v Government of the State of Pahang [1978] 2 MLJ 105, HC (refd)
Vijayalakshmi Devi d/o Nachatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709, FC (refd)

Legislation referred to

Federal Constitution art 13
Government Proceedings Act 1956 ss 29, 29(1)(a), (b), (2), 33, 33(1)
Internal Security Act 1960
Rules of the High Court 1980 O 29
Sarawak Land Code s 200(e)
Specific Relief Act 1950 ss 8(3), 54

Appeal from: Suit No 21–6 of 2008-III (High Court, Kuching)

JC Fong (Saferi bin Ali with him) (State Attorney General of Sarawak, Attorney General's Chambers) for the appellants.

Tan Thiam Teck (Paul Tang Ngoong Wee with him) (The Law Firm Advocate & Solicitors) for the respondent.

Suriyadi JCA:

[1] The panel allowed this appeal with costs and we had accordingly set aside the interim injunction order granted by the High Court on 7 November 2008. At the outset, it must be clarified that with the High Court order being interim in nature, much of our focus was directed on such type of injunctions, though touching on some aspect of permanent injunctions against the government, its departments and servants was inevitable. It is quite established now that we were merely to review the decision of the learned judge and conclude whether he had correctly applied all the right principles when meting down the interim injunction. It is not incumbent upon us to substitute his decision premised on the ground that we would have arrived at a different finding, had we been in his shoes, subject to him having correctly adhered to all the established legal principles. If either he has committed an error in law, misconceived the facts, not giving sufficient weight to relevant matters but taking into account irrelevant ones or the decision would result in injustice, it then becomes incumbent upon us to set that order aside (*Vijayalakshmi Devi d/o Nachatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709). In *S & F International Ltd v Trans-con Engineering Sdn Bhd* [1985] 1 MLJ 62 at p 64 the Federal Court had occasion to state:

> We should perhaps also reiterate and stress the point that the discretion whether or not to grant an interlocutory injunction is vested in the High Court judge and not the appellate court whose function initially is one of review only, and it will not overrule the decision of the judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently …

[2] We now supply the reasons why we allowed the appeal. The appellants had supplied four main grounds for our consideration, viz the court had granted an interim injunction even though:

(a) that injunctive relief was never sought out in the writ;

(b) s 29 of the Government Proceedings Act 1956 (GPA) and s 54 of the Specific Relief Act 1950 (SRA), do not permit the granting of any injunction against the government and government departments respectively;

(c) the balance of convenience did not favour the granting of such an order; and

(d) damages were adequate to compensate the respondent in the event it wins the main suit.

[3] But first we reproduce the salient facts of the matter before us. The respondent purchased the impugned land ('the land') in 1988 at a purchase price of RM3,500,000, and as pleaded, it has a current estimated value of RM14,000,000. It then became the registered owner of it. The respondent subsequently obtained approval for the erection of buildings on the land from Dewan Bandaraya Kuching Utara (DBKU), subject to the terms and conditions listed in the letter of approval. Due to stoppages in the construction works and with the site being deeply excavated it became a danger to the adjoining land and public at large. The approved building plan subsequently lapsed. Due to the non-compliance of that building plan, what with the existence of danger to the adjoining land and the public, after statutory notices had been served on the respondent, the appellants re-entered and forfeited the land on 13 February 2006. A certificate of re-entry dated 13 February 2006 was gazetted by the Sarawak Government and a memorial of the re-entry was noted on the land registry to legalise that repossession.

[4] A respite of relief against the forfeiture over the land was granted but subject to certain terms and conditions, amongst them that the plan for the development of the land be approved by the State Planning Authorities, and a sum of RM12,759,941 be deposited by the respondent with DBKU as security. Despite agreeing to that relief, the respondent failed to satisfy those conditions thus leaving the land forfeited to the government, which now has reverted to the state.

[5] Being dissatisfied the respondent filed a writ seeking a declaration or declaratory order, inter alia, that:

(a) the purported re-entry was unlawful, invalid, null and void;

(b) the re-entry be set aside;

(c) the memorial be declared null and void;

(d) the certificate of re-entry be declared null and void;

(e) the respondent was still the legal and beneficial owner;

(f) the respondent was entitled to the land as against the fourth appellant; and

(g) damages.

[6] Subject to certain statutory curtailment, a court may issue declaratory decrees pertaining to the status or right of any person entitled to any legal character, or to any right as to any property. He is entitled to institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled. Such a declaratory order would be binding on the relevant parties to the suit. In *Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 2 MLJ 148, Abdoolcader J (as he then was) said at p 151 on the jurisdiction to grant declaration said:

> The jurisdiction to grant declaration is extremely wide. Lord Sternadle MR, said in *Hanson v Radcliffe Urban District Council* (at p 507): 'The power of the court to make a declaration ... is now almost unlimited. I might say only limited by its own discretion'. And this was affirmed by the Privy Council in *Ibeneweka v Egbuna* …

[7] It was our view that even if success were to be on the side of the respondent, though impeded by certain statutory restrictions, the presiding learned judge may have to make certain consequential orders, but certainly not repossession by the respondent. But more of this later.

[8] I now touch on the pleading's matter first ie the 'preliminary' issue in the appeal. The appellants had ventilated that the interim injunctive relief was never sought for in the writ but yet granted. To resolve this issue we need only to scrutinise O 29 of the Rules of the High Court 1980 ('RHC 1980'). It reads:

> Order 29
>
> INTERLOCUTORY INJUNCTONS, INTERIM PRESERVATION OF PROPERTY, ETC
>
> 1 Application for injunction (O 29 r 1)
>
> (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, *whether or not a claim for the injunction was included in that party's writ*, originating summons, counterclaim or third notice, as the case may be. (Emphasis added.)

[9] The respondent here had applied for an injunction in the originating summons, a prayer that was co-extensive to the writ filed earlier by the respondent. With O 29 of the RHC 1980 wide enough to cover the current situation, even though the writ was silent as to the injunction prayer and despite a subsequent amendment, we held the view that this first ground of the appellant must fail.

[10] The second ground is substantive in nature as it relates to the actual jurisdiction of granting the injunction. Even though the High Court has the discretion to grant it, s 29 of the GPA does not permit the granting of any injunction against the government, and likewise s 54 of the Specific Relief Act has the same bar for any department of any government in Malaysia. Section 29 of the GPA stipulates:

29 Nature of relief

(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that —

(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

[11] Section 54 of the SRA 1950 reads:

54 Injunction when refused

An injunction cannot be granted —

(a) ...

(b) ...

(c) ...

(d) to interfere with the public duties of any department of any Government in Malaysia, or with the sovereign acts of a foreign Government;

[12] As regards s 29(1)(a) of the GPA, the respondent have adduced local precedents to deal with the latter, and learned counsel for the respondent have come out strongly that courts are now quite inclined to grant interim injunctions against the government, despite the statutory inhibitions. The respondent conceded that it was barred from obtaining a permanent injunction against the government under the above provision though one could be granted against government servants.

[13] In support of its stance the respondent had referred to *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325. The headnotes pertaining to the facts of the case are as follows. The appellant, a private limited company, carried on the business of a canteen operator at the first respondent's government hospital. The appellant's case was that in reliance of the assurance of the first respondent, it borrowed money and incurred expenses for the canteen but the first respondent had instead resiled from its assurance by terminating the contract. The first respondent subsequently granted the contract for operating the canteen to the fourth respondent. The appellant complained that the first respondent acted in breach of contract and constructive trust. It applied for an urgent injunction against the first and fourth respondents from evicting it from the canteen premises of the first respondent but dismissed by the judicial commissioner. The sole ground relied upon by the latter was that the court had no jurisdiction to grant the injunction. Two issues had to be resolved by the court viz whether, in view of the provisions of s 29 of the GPA, the High Court had jurisdiction to grant the injunction sought; and whether the facts entitled the appellant to an injunction in the exercise of the court's discretion. The appeal was dismissed but in the course of it the Court of Appeal had occasion to state that the courts have jurisdiction to grant interim and permanent injunctions against any servant of the government. At p 336, the court had remarked:

> … In our judgment, the effect of current authority is that our courts have jurisdiction to grant interim and permanent injunctions against any servant of the government. Accordingly, there was no jurisdictional bar to the High Court granting the instant appellant the injunction it sought against the first respondent, the director of the hospital in question. Since a government servant or a member of the Cabinet may be restrained by injunction, it is strictly unnecessary from a practical point of view to decide whether the government itself may be restrained in appropriate circumstances. Nevertheless, since the question is one which was argued before and ruled upon by the learned judicial commissioner, we think it behoves us to deal with the point. We accordingly proceed to consider the position of the second and third respondents, namely, the Ministry of Health and the Government of Malaysia.
>
> [23] *It has been settled since at least 1978 that s 29 of the 1956 Act does not prohibit the grant of temporary injunctions against the Government. In Tengku Hj Jaafar & Anor v Government of the State of Pahang [1978] 2 MLJ 105 it was held that the*

section 'does not take away therefore the right of the court to grant an interlocutory injunction'. This court in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 treated the ratio in *Tengku Hj Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105 as settled law. Although the Federal Court reversed our decision in that case on the constitutional point, our judgment on this point was approved sub silentio. Accordingly, *it is too late in the day to argue that s 29 bars the grant of an interlocutory or even an interim injunction against the government*. (Emphasis added.)

[14] In the abovementioned *Tengku Hj Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105, the applicants had applied for an interim injunction to restrain the respondent from dealing with the property, the subject of the civil suit between the applicants and the respondent. The plaintiff-applicants claimed that the land was a gift to the plaintiff from the first Sultan of Pahang many years ago. The state government disputed the claim. The applicants alleged that the state government was likely to proceed with the alienation of certain portion of the land for development by way of lease, licence or outright alienation despite current proceedings in court and had disposed certain portions to various bodies without the consent of the applicants thus causing loss to the latter. The application was dismissed as greater hardship and inconvenience would be caused to the respondent than the applicants if the injunction was issued at that stage as government endeavours would be put to a halt in a vast territory of land where the question was yet to be determined as to whether the plaintiff would succeed at the trial or not.

[15] The learned judged said at p 106:

It seems to me from the foregoing that the strict and just application of s 29(1) of the Government Proceedings Ordinance would necessarily require, therefore, that an interlocutory injunction must lie against the government if only to give effect to the provision that a declaratory order only may be made against the government since without an interim injunction the government would be free to act to effect if necessary the ultimate destruction of the subject matter of the declaration and thus render the purport and effect of the section nugatory and useless. It is said that no injunction at all could be issued against the government because the section says so. But it is also said by the section that such relief may be had against the Crown as may be given as between subject. Thus said, in my view in order to achieve a proper balance as between the right of the individual to obtain relied against the Crown and the right of the Crown to limit that relief to merely getting a declaratory order, an interim injunction becomes necessary only in order to preserve the status quo of the parties pending the declaration otherwise the whole object of the section is ab initio defeated.

[16] In support of its position, and in the course of the appeal the current respondent had alluded to a portion of Arifin Zakaria FCJ's (as he then was)

statement in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641, which reads at p 665:

> [76] In *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325, the Court of Appeal at p 333 stated:
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> ...
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> [77] In that case the Court of Appeal held, inter alia, that the courts have jurisdiction to grant interim and permanent injunctions against any servant of the government. It also held that it is too late in the day to argue that s 29 of the GPA bars the grant of an interlocutory or even an interim injunction against the government. *That is not the issue before us, as such I would not venture to say anything more on this save that the courts have moved away from the traditional stand that no order of injunction may be granted against the government.*
>
> [78] The position now is the courts in the Commonwealth, Malaysia including, have moved away from the traditionalist approach that the Crown can do no wrong. (Emphasis added.)

[17] In the above Federal Court case, the facts are that the respondent after obtaining a monetary judgment against the State Government of Sabah, successfully obtained a certificate of judgment sum and order for costs pursuant to s 33(1) of the GPA. The latter made no payment pursuant to that certificate. The matter eventually landed at the Federal Court and leave to appeal was on a single issue of law, which was whether judicial proceedings could be undertaken against the government to compel payment of a judgment sum certified in the certificate issued under the said s 33(1). At the end of the hearing the appeal was dismissed with costs. The court stated that once a certificate was issued under s 33(1) of the GPA the state government was under an obligation to make the necessary payment.

[18] We have italicised the relevant portion of the learned judge's remark, as in our considered view that remark is obiter in nature, with his views merely targeting the tendencies of courts in certain situations. Certainly we accede to the view that Malaysia has moved away from the traditionalist approach that the Crown can do no wrong. Undeniably at no time was the issuance of an injunction under discussion there unlike that of this appeal where the facts and legal issues are easily distinguishable.

[19] Needless to say the words of s 29(1)(a) of the GPA are quite clear and there is no reason to depart or whittle away what has been built into it. In

Lim Kit Siang v United Engineers (M) Bhd & Ors [1987] 2 CLJ 195, the Supreme Court affirmed the view of the High Court judge as regards the express prohibition in s 29, though not the extension of its scope. It was unable though to agree that the provision prevents the granting of an injunction against a party (UEM there) having a transaction with the government.

[20] Apart from the clarity of s 29(1)(a) of the GPA this panel was also confronted by the prohibition of the issuance of an injunction against any Government departments (s 54 of the SRA), as opposed to a s 33 certificate of the GPA in the above case, where a court is not prevented from assisting an aggrieved party. Most pertinently, the injunction applied for by the respondent here does not merely revolve around an injunction per se against the government, say on some administrative issue, but connected to land that has been reacquired by the government, and recovery of which is statutorily precluded. In a gist, there exist at least two substantive prohibitions in this appeal.

[21] The preclusion provision is s 29(1)(b) of the GPA (see also s 8(3) of the SRA) and it provides that, 'in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of land or the delivery of the property …' though in lieu it may make an order declaring that the plaintiff is entitled as against the government to the land or property. The Privy Council at p 365 in *Pemungut Hasil Tanah Daerah Barat Daya, Penang v Kam Gin Paik & Ors* [1986] 1 MLJ 362 applied the law when it held as follows:

> However, Their Lordships agree with the Federal Court that s 29(1)(b) of the Government Proceedings Ordinance 1956 precludes an order being made against the government, whose servant the appellant is, for the recovery of the land. So the Federal Court rightly set aside that part of the order of the learned trial judge which ordered the appellant to deliver possession of the lands back to the respondents.

[22] In *Evergreen Frontier (M) Sdn Bhd v The Director of Lands and Surveys (Sabah) & Anor* [2005] 2 MLJ 644; [2004] 8 CLJ 156 the learned judge refused to mete out an order that smacks of specific performance against the government as it runs afoul of the above s 29 of the GPA, and had substituted the unfairness of the defendant by damages to be assessed. Therefore, implicitly an aggrieved person, though unable to recover the land or have it delivered to him is not deprived of certain entitlement, say compensation, though with some help from the court.

[23] In *Bato Bagi & Ors v Government of the State of Sarawak* [2008] 5 MLJ 547; [2008] 6 CLJ 867, a declaration was sought as to whether the government or its servants/agents could be ordered to vacate the land claimed, an order that tantamount to ordering the government to deliver vacant possession of that land. Also in relation to s 29(1)(b) of the GPA, the learned judge said:

> Thus any order made contrary to the abovementioned provision is liable to be struck down or set aside on appeal …
>
> Counsel for the defendant submitted that an order for the defendant or its servants or agents to vacate the land in question would tantamount to the defendant delivering vacant possession thereof to the plaintiffs and thus would offend s 29(1)(b) of the Government Proceedings Act 1956. I agree …

[24] With the presence of the above prevailing statutory prohibition, there was thus no prospect of the respondent recovering possession of the land from the government. With preclusion of the right of recovery of the land in this appeal, and tacitly admitted by the respondent before us, we saw no logical reason why an injunction (the prohibition of s 29(1)(a) of the GPA aside), should have been granted at all.

[25] On the other hand, if a permanent injunction cannot be granted against the government (and even conceded by the respondent), can the court order an interim injunction against any government department under s 54 of the SRA? Authorities show that this provision is meant for permanent injunctions (*Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323; *Bina Satu v Tan Construction* [1988] 1 MLJ 533). Before responding to the above question, we need to state at the outset that the respondent agreed that it is barred from obtaining a permanent injunction against the government under s 29 of the GPA. On the other hand, even though it ventilated that a permanent injunction could be obtained against a government servant, it failed to identify the provision for that proposition, and instead cited the case of *Sabil Mulia* as its authority.

[26] In *Saw Seng Kee v Director of Lands & Mines, Penang & Ors* [1987] 1 MLJ 80, it was held that a public authority should not be restrained by interlocutory injunction from exercising its statutory powers unless the applicant has shown a real prospect of success in his claim for a permanent injunction at the final hearing. In this current appeal, it was improbable that a permanent injunction could have been obtained by the respondent as at no time did it apply for a permanent injunction against government servants; and even if it did, with the law as it stood the probability was slim. With such a scenario how then could an interim injunction be granted?

[27] Apart from the distinctive statutory prohibition of s 54 of the SRA, there was no reasonable excuse why government departments here should be prevented from carrying out their daily responsibilities, especially when adjoining properties were facing water seepages from the excavated area, let alone danger to the public had now become a serious issue as admitted by the respondent. How is the relevant department ever going to carry out its duties if its employees are injuncted? It is obvious in this case that although injunctions were also sought against government departments and government servants, in substance and effect, those injunctions were actually against the government, a scenario that is also adequately covered by s 29(2) of the GPA, and it reads:

> (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

[28] When courts are faced with injunction applications, the factor of balance of convenience has to be considered in the course of their deliberation, and when assessing where the balance of convenience lies, the interest of the public may rightly be taken into consideration (*Smith v Inner London Education Authority* [1978] 1 All ER 411). No government departments can afford to take lightly any admission that the excavated area had posed a threat to the public. As Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court of Appeal in *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133 said:

> … I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.

[29] To wind up all the above prohibitive provisions, the rationale of allowing the government, any government department or government servants to carry out its duties to the public, and without fear of any unnecessary impediment, must be one of the many obvious reasons why the GPA and the SRA have been so legislated in that manner.

[30] As regards the grievances of the respondent, we were of the view that, once the rights have been successfully established vide the declaration action, there was no impediment for the respondent to sue for damages. Indeed, we were initially perturbed by the near improbability of the respondent successfully obtaining damages from the government, due to the

promulgation of s 200, especially para (e) of the Sarawak Land Code, despite a successful declaratory action. This relevant provision reads:

> Government not liable in certain cases
>
> 200 Notwithstanding that effect may have been given to the same by entry on the Register, the Government shall not under any circumstances be liable for compensation for any loss, damage or deprivation occasioned by any of the following things:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) by the improper exercise of any power of sale or re-entry;

[31] Simply put the respondent had canvassed that, due to the way the words have been couched, it would be left without any remedy at all, as the law had unwittingly plugged every possible avenue. In such a scenario, unless the court comes to its rescue and ensure status quo, in order for any declaratory order to have meaning, injustice may be the end result. The case of *Menteri Hal Ehwal Dalam Negeri, Malaysia v Karpal Singh* [1992] 1 MLJ 147 was canvassed to us by the respondent to clarify the matter. In this case, Karpal Singh had sought a declaration pertaining to the validity of an order of detention under the Internal Security Act 1960 against him, and also the restrictions and conditions imposed on him. The originating summons was taken out after the detention order was suspended but before the detention order was cancelled. However when the originating summons came before the learned judge the detention order was already cancelled. The court opined that as the matter had become academic, and the respondent having no real interest in the declarations, it would not act in vain.

[32] The above situation was what was feared by the respondent in the current appeal. It ventilated that an interim injunction was necessary in order to avoid a pending declaratory order from being reduced to mere paper, as forces were at work to have the property transferred and registered to a third party. Once that happens it would be quite impossible for any court to order the undoing of any registration of the immoveable property or bring matters back to square one.

[33] Our fears were allayed when the appellants conceded that they would never allude and advocate s 200(e) in order to defeat the respondent's case for damages. We were not unmindful that art 13 of the Federal Constitution

would protect the rights of the respondent in any suit for damages against the Sarawak Government; with such assurances any fear of the respondent being deprived of compensation in any future proceedings had been dispelled. Given that the property is valued currently at RM14,000,000 as asserted by the respondent in its pleadings, this panel certainly was satisfied that any litigated damages were quantifiable. To wrap up this issue permit us to reproduce the words of James Foong J (as he then was) in *CCA Holdings Ltd v Palm Resort Bhd* [1998] 4 MLJ 143 at p 147 when he said:

> If damages in the measure recoverable at common law be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.

[34] In *Saw Seng Kee v Director of Land & Mines, Penang & Ors* [1987] 1 MLJ 80 at pp 81–82 Edgar Joseph Jr J (as he then was) held:

> 'The very first principle of law,' said Lindley LJ in *London Blackwall Railway Co Cross*, (2) —
>
> > … is that prima facie you do not obtain an injunction to restrain actionable rights in which damages are the proper remedy.
>
> In the *Cyanamid*'s case, Lord Diplock made the same point at p 408 B & C in the following terms:
>
> [T]he court should first consider whether, if the plaintiff were to succeed at the trial in establishing its right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages … would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at the stage.

[35] As we were satisfied that:

(a) the combined effect of the hurdle of s 29(1)(a) of the GPA, in that no injunction may be ordered against the government, and the preclusion of s 29(1)(b) of the GPA whereby courts cannot order the recovery of the land from the government or the delivery of property to the respondent had not been overcome; or

(b) the balance of convenience founded on public interest or sufficiency of damages favoured the non-issuance of an injunction, regardless of the above statutory inhibitions,

A we accordingly meted down the consequential orders. To reiterate, apart from allowing the appeal as stated in the opening paragraph of this grounds of judgment, we thereupon ordered that the interim injunction be set aside, costs ordered for here and below, and that the deposit refunded to the appellants.

B

Appeal allowed, interim injunction set aside with costs here and court below.

Reported by Kanesh Sundrum

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